

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i> ,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S SUBMISSION OF PROPOSED  
SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Court's directive, the State of Oklahoma ("the State") respectfully submits the following proposed supplemental findings of fact and conclusions of law regarding a possible form of injunctive remedy posited by the Court during closing arguments -- namely, that (1) land application of poultry waste in the IRW by growers be allowed up to the maximum rate provided for under Code 590 (*i.e.*, 300 lbs/acre STP), and (2) Defendants be required to provide a market for the removal from the IRW of any poultry waste that could not be applied by growers without exceeding this maximum rate. *See* Daily Trans., 11687:18-11688:13.

**I. Proposed Supplemental Findings of Fact and Conclusions of Law**

WHEREAS, at closing arguments, the Court posited:

THE COURT: One of the things that neither of you have addressed in your proposed findings and conclusions, and I'd like for you to think at least about the possibility of submitting supplemental proposed findings and conclusions by a reasonable date, but it is this general idea, and I'll throw it up and allow you to shoot it down as a possible approach here, but to the extent that the State of Oklahoma allows application of poultry litter up to a certain amount, that perhaps could remain, given that the State has allowed it through its regulations, but to the extent there is greater poultry litter in a barn than a grower can apply, that the defendant poultry integrators be required to provide a market either by buying it from the growers and transporting it out of state, or providing the market, being the market maker as was tried previously but has since ended, to allow that excess

poultry litter beyond that which the State itself permits to be applied on these growers' farms to be transported out of state.

*See* Daily Trans., 11687:18-11688:13;

WHEREAS, the parties have submitted proposed supplemental findings of fact and conclusions of law concerning the foregoing;

NOW, THEREFORE, upon due consideration of the proposed supplemental findings of fact and conclusions of law, the extensive evidentiary record and the applicable law, the Court makes the following Supplemental Findings of Fact ("SFOF") and Supplemental Conclusions of Law ("SCOL"):<sup>1</sup>

**A. Supplemental Findings of Fact**

1. Land application of poultry waste in the IRW in excess of the agronomic critical level for phosphorus is not protective of the environment. *See, infra*, SFOF, ¶¶ 2-11; *see also* FOF, ¶¶ 380-88, 449-53, 611-16.

2. Specifically, it is a well-established scientific fact that the amount of dissolved phosphorus in runoff increases with STP values. *See* Daily Trans., 5028:3-10 (Johnson Testimony); *see also* Daily Trans., 5029:19-22 (Johnson Testimony) (testifying that "[i]f the STP doubled, then the concentration of phosphorus would quadruple"); Daily Trans., 5719:13-25 (Engel Testimony) ("[S]oil test phosphorus is vital to the amount of phosphorus that is going to run off of fields. So even at very low soil test phosphorus levels, one gets some phosphorus running off, but even as they increase, there's a linear increase, or an even more pronounced increase potentially, in the amount of phosphorus running off due to elevated soil test phosphorus levels"); Daily Trans., 9209:1-6 (Connolly Testimony) (agreeing that elevated STP

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<sup>1</sup> Findings of fact shall be construed as conclusions of law and *vice versa* as appropriate.

levels increase the concentrations of phosphorus in runoff); State's Ex. 3312 at ADEQ-226 ("Nitrogen and phosphorus should be applied at a rate not greater than what cover plants can assimilate. . . . Excess values built up in the soil will be washed into surface waters whenever erosion occurs"); State's Ex. 3145 at 2249-2 ("[I]ncreasing the amount of P in soils results in increased levels of P in soil solutions (Figure 3). Generally, this will result in small, but environmentally important, increases in the amount of dissolved P in water that passes over or through soils.") (emphasis added).

3. The principal pasture grasses grown in the IRW are fescue and bermuda grasses. *See* Daily Trans., 9864:23-9865:1; 9884:25-9885:2 (Clay Testimony). At an STP of 40 lbs/acre, there is a 95 percent sufficiency of the phosphorus requirements for the growth of these grasses, while at an STP of 65 lbs/acre, there is a 100 percent sufficiency. *See* State's Ex. 3169; State's Ex. 3168.

4. "Science-based fertilizer recommendations used by Oklahoma State University, based on decades of field and laboratory research, show a STP value of 65 is adequate for production of most crops." *See* State's Ex. 3145 at p. 2 (Oklahoma Cooperative Extension Service); Daily Trans., 5001:9-12 (Johnson Testimony).

5. A field-average soil test of 120 lbs/acre (based on 15 to 20 cores per field) can be used to ensure that 95 percent of the area of a field has sufficient P with soil test levels of 65+ lbs/acre and to prevent any localized deficiencies due to soil variability. *See* State's Ex. 3145 at p. 2; Daily Trans., 5020:19-5022:6 (Johnson Testimony) (testifying that "if you have a large field and you sample, getting 20 cores from that field to get a bucket of soil, and if the average soil test for that bucket is 65, it will have been some cores of soil from some parts of the field where the soil test would have been less than 65. So we calculated that in order to eliminate all of

those, you would have to have an average soil test of 100 to 110. So we suggested that if you use the soil test of 120, then even in these cases of spatial variability out in the field, you would have corrected all the places where you might get a response to fertilizer.").

6. Significantly, however, there would be no noticeable difference in crop response between a field-average soil test of 120 lbs/acre and a field-average soil test of 65 lbs/acre. *See* Daily Trans., 5174:3-16; 5022:2-6 (Johnson Testimony) ("I don't think the farmer would ever see it. If he had careful precise ways of measuring the yield, he might be able to detect the difference in yield, but it's not the kind of response that you would see or that would be economical.").

7. Put another way, at land application rates in excess of agronomic need for phosphorus, there is no crop benefit. *See* Daily Trans., 5174:4-8 (Johnson Testimony); Daily Trans., 5022:7-9 (Johnson Testimony) (testifying that there is no realistic possibility for an increase in plant response above 120 lbs/acre STP). Accordingly, the Oklahoma Cooperative Extension Service states that "nutrient utilization standards that are protective of the environment would require that animal manure applications do not result in soil test phosphorus levels that exceed 120." *See* State's Ex. 3145 at p. 2.

8. In fact, at trial there was testimony that at land application rates in excess of agronomic need for phosphorus, such application constitutes waste disposal. *See* Daily Trans., 5022:19-5023:9 (Johnson Testimony) (testifying he would characterize additional land application of phosphorus from poultry waste at levels above 120 STP as "waste disposal" and in fact has done so in a January 1998 published report).

9. Although Arkansas regulations are not controlling here, it is telling that the "protective rate" for commercial fertilizer in the new Arkansas regulations recommends no

additional phosphorus for soils having STP values greater than 100 lbs/acre (the Arkansas agronomic critical value).<sup>2</sup> *See* DJX 8133 (New ANRC Rules, Appendix B). The new Arkansas regulations, which became effective January 1, 2010, *see* DJX 8133 (New ANRC Rules, XXII), define the "protective rate" as "the application rate for commercial fertilizers approved by the Commission for designated Nutrients that provides for proper Crop utilization and prevention of significant impact to Waters Within the State." *See* DJX 8133 (New ANRC Rules, Title XXII, § 2201.4(X)). The obvious corollary to these points is that Arkansas deems prohibitions on the application of phosphorus above 100 lbs/acre STP as preventing significant impact to waters of that state.

10. Finally, it must be recognized that field-specific restrictions on the land application of poultry waste are a field management tool, not a watershed management tool. *See* Daily Trans., 9597:1-5; 9597:9-14 (Smith Testimony); Daily Trans., 6654:9-17 (Engel Testimony) (testifying that NMPs are "absolutely site specific" and that they are not written with a view to protecting the watershed as a whole, but rather to attempt to reduce phosphorus running off from a specific field). This is an important consideration. As Defendants' expert Dr. Sullivan recognized, one of the issues with nonpoint source pollution is that there can be what amounts to "death by a thousand cuts." *See* Daily Trans., 10932:16-22 (Sullivan Testimony). That is, over an entire watershed, small but environmentally-consequential releases of phosphorus combine to create the overall pollution of a waterbody.

11. Based upon the foregoing, the Court finds that the agronomic critical level for phosphorus in the IRW is 65 lbs/acre STP.

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<sup>2</sup> While Arkansas employs an STP of 100 lbs/acre as the agronomic critical level, there is no research supporting this higher level. *See* Daily Trans., 5187:7-11 (Johnson Testimony).

12. Based upon the foregoing, the Court finds that any land application rate in excess of this agronomic critical level for phosphorus is not protective of the environment, and will result in continued and unnecessary pollution of the IRW from poultry waste phosphorus. *See* FOF, ¶¶ 439-635; SFOF, ¶¶ 1-2.

## **B. Supplemental Conclusions of Law**

1. Oklahoma law specifically requires that "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b); Daily Trans., 2903:14-18 (Gunter Testimony) (testifying that "[t]he statute absolutely prohibits the pollution."). *See also* 27A Okla. Stat. § 2-6-105(A) ("It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any . . . waters of the state. Any such action is hereby declared to be a public nuisance.").

2. Possession of an Animal Waste Management Plan ("AWMP") is a prerequisite to any land application of poultry waste in the Oklahoma portion of the IRW. *See* 2 Okla. Stat. § 10-9-19a. An AWMP, however, is not a permit to land-apply poultry waste in the Oklahoma portion of the IRW. *See* Daily Trans., 2902:1-3 (Gunter Testimony) (testifying that ODAFF does not view an AWMP as a permit); *see also* Daily Trans., 435:23-24 (Tolbert Testimony) (testifying that ODAFF does not issue permits for the land application of poultry waste); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."); *Estes v. Conoco Phillips Co.*, 184 P.3d 518, 524

(Okla. 2008) ("This Court will show great deference to an agency's interpretation of its own rules.").

3. Any and all land application of poultry waste in the Oklahoma portion of the IRW is subject to the requirement that "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b); *see also* Daily Trans., 2903:23-2904:2 (Gunter Testimony).

4. AWMPs in Oklahoma make clear that any land application of poultry waste is subject to this overarching principle. *See, e.g.*, DJX 3051 at p. 4 (Anderson AWMP providing that "[a]ll waste will be applied in accordance with all state and local laws and ordinances" and that "[d]ischarge or runoff from waste application sites is prohibited"); DJX 0001 at p. 4 (Saunders AWMP providing that "[a]ll waste will be applied in accordance with all state and local laws and ordinances" and that "[a]ny one of the following conditions will prohibit the surface application of litter: . . . (h) [a]reas where there will be discharge from the application site"); DJX 3480 at p. 4 (Reed AWMP providing same).

5. The maximum poultry waste land application rates set forth in AWMPs in Oklahoma are determined with reference to the United States Department of Agriculture Natural Resources Conservation Service Waste Utilization Standards (the so-called "Code 590"), unless the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") approves other standards. *See* 2 Okla. Stat. § 10-9.7(E)(1)(c); 2 Okla. Stat. § 10-9.19(3); Daily Trans., 2910:16-2911:2 (Gunter Testimony).

6. Code 590 sets forth a maximum land application rate of 300 lbs/acre STP in a nutrient-limited watershed such as the IRW. *See* Daily Trans., 2911:3-7 (Gunter Testimony);

Daily Trans., 3570:5-8 (Strong Testimony); DJX Ex. 3916. Defendants' expert Dr. Sullivan is aware of no study that has measured the effectiveness of Code 590 in limiting phosphorus runoff. *See* Daily Trans., 10932:10-10933:1 (Sullivan Testimony).

7. The maximum land application rate of 300 lbs/acre STP in a nutrient limited watershed set forth in Code 590 is not scientifically based, *see* Daily Trans., 3688:24-3689:5 (Strong Testimony); Daily Trans., 5088:5-8 (Johnson Testimony), and has no relation to -- and in fact is 3-4 times in excess of -- the agronomic critical level necessary for the growth of the forage grasses common to the IRW. *See* SFOF, ¶¶ 2-8, 11.

8. Significantly, nothing in Code 590 (or the Oklahoma Registered Poultry Feeding Operations Act ("ORPFOA")) requires that poultry waste be land-applied at the maximum land application rate of 300 lbs/acre STP. *See* Daily Trans., 2911:8-11 (Gunter Testimony); Daily Trans., 3575:21-3576:7 (Strong Testimony) (testifying that there are restrictions that go beyond merely the land application rate). If an environmental hazard is created or contamination of the waters of the State from a land application site occurs, even if the application was within the limits of the maximum land application rate provided for in the applicable AWMP, that person would be violating his/her AWMP, the ORPFOA, and Oklahoma law generally.<sup>3</sup> *See* Daily

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<sup>3</sup> The maximum land application rate of 300 lbs/acre STP in no way authorizes land application of poultry waste in a manner that would create an environmental or a public health hazard or result in the contamination of waters of the State. In order to receive the protections of 50 Okla. Stat. § 4, nuisance-causing acts must be "authorized by the express terms of the statute." *See Herd*, 2003 U.S. Dist. LEXIS 27381, \*35-36 (N.D. Okla. July 11, 2003) (finding that "[b]ased on the record, the Court finds that the regulations or leases are not sufficient to be considered authorization of an 'exact method of operation,' such that Defendants' creation of the chat piles and tailing ponds is immune from a nuisance claim"); *see also Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985); *Union Oil Co. v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994). As in *Herd*, the legislature has not decided that the public good requires certain necessary nuisances, providing no defense to the nuisance created in the present case. *See Herd*, 2003 U.S. Dist. LEXIS 27381, \*34. Here, pollution from land applications of poultry waste in the IRW is

Trans., 2903:23-2904:7; 2911:21-24 (Gunter Testimony); 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b); 27A Okla. Stat. § 2-6-105(A).

9. Simply put, the proposition that Oklahoma law "allows" land application in a nutrient-limited watershed at rates up to 300 lbs/acre STP is premised on an incomplete and out-of-context reading of the ORPFOA. The overarching requirement of the ORPFOA is that there be no environmental hazards or contamination created as a result of land application of poultry waste, and every other provision of the ORPFOA must be read as being subject to this overarching requirement. *See* FOF, ¶¶ 411-12, COL, ¶¶ 97-100 & SCOL, ¶¶ 1-4. Thus, an application rate of up to 300 lbs/acre STP is subject to the applicator ensuring that no environmental hazards or contamination are created by the poultry waste application. *See* FOF, ¶¶ 411-12, 415, COL, ¶¶ 97-100, & SCOL, ¶¶ 1-8. The evidence in the record is overwhelming that in the IRW application rates in excess of agronomic rates have created an environmental hazard and contamination of the waters of the State. *See* FOF, ¶¶ 439-635 & SFOF, ¶¶ 2-11. Given that an AWMP is not a permit, that Code 590 provides a maximum application rate and not a required application rate, and that an application rate in excess of the agronomic critical level greatly increases pollution from poultry waste phosphorus run-off, it is entirely appropriate to "squeeze" the maximum application rate for land application of poultry waste of the IRW down to that level -- the agronomic critical level (*i.e.*, 65 lbs/acre STP) -- which will help accomplish the goal that land application of poultry waste in the IRW "not create an

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clearly not "authorized by the express terms of the statute." In fact, just the opposite is true. *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b).

environmental or a public health hazard, [and] not result in the contamination of waters of the state."<sup>4</sup> See 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b).

10. Contrary to Defendants' suggestion, "squeezing" the maximum application rate for land application of poultry waste of the IRW down to the agronomic critical level would in no way be inconsistent with Oklahoma law. See, e.g., Daily Trans., 533:13-23 (Tolbert Testimony) ("Q: . . . In order for His Honor to impose an agronomic limit, His Honor would have to nullify this portion of Oklahoma law as expressed in Code 590; is that correct? A: That is not correct. It would not nullify it. This is a maximum, and it would be completely consistent with this to require a number smaller than that. Q: You're saying that if His Honor imposed an agronomic rate, it would not nullify this portion of Code 590 which refers you to the table 9 calculations for the maximum rate? A: That is correct. It's consistent with that.").

Rather, such a "squeeze" is entirely consistent with the Oklahoma Supreme Court teaching that Oklahoma statutes must be construed "in such manner as to reconcile the different provisions and render them consistent and harmonious, and give intelligent effect to each. Thus, where parts of a statute reasonably are susceptible of a construction which will give effect to both, without doing violence to either, such construction should be adopted." See *Oklahoma Independent Petroleum Association v. Youngker*, 769 P.2d 109, 114 (Okla. 1988) (citation and quotations omitted).

11. Likewise, there is no legal impediment to "squeezing" the application rate for land application of poultry waste down to the agronomic critical level of 65 lbs/acre STP in Arkansas.

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<sup>4</sup> Land application at agronomic critical levels is not, standing alone, sufficient to address the poultry waste pollution problem in the IRW. Additional steps -- such as the creation of buffer strips, see FOF, ¶¶ 636-43, 732, as well as such other remedial steps identified through a remedial alternatives investigation to be funded by Defendants -- will be necessary.

While Arkansas has a regulatory scheme pertaining to the management of poultry waste, such scheme must yield to the federal common law. *See, e.g., American Petrofina Co. v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988) (affirming decision that federal common law preempted state statutory provision); *see also Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 314 (1955) ("States can no more override such judicial rules validly fashioned than they can override Acts of Congress."). Moreover, and in any event, it is axiomatic that Arkansas cannot "permit" nonpoint source pollution of Oklahoma's waters. Finally, the record is replete with evidence that Arkansas's regulatory scheme pertaining to the management of poultry waste -- which uses a phosphorus index,<sup>5</sup> *see* FOF, ¶¶ 426-38 -- has not stopped pollution of the water. *See, e.g.,* Daily Trans., 9597:15-25 (Smith testimony) (admitting that Arkansas phosphorus index has not stopped nonpoint source pollution from poultry waste); State's Ex. 3187 (Tyson admitting that Arkansas phosphorus index was allowing land applications well in excess of agronomic critical levels); State's Ex. 3041 (BMP minutes admitting that Arkansas phosphorus index was allowing growers to put out more poultry waste than they had in the past); Daily Trans., 3121:22-3122:12 (Henderson Testimony) (George's Defendants' former president admitting concerns that the Arkansas phosphorus index was not restrictive enough). Simply put, phosphorus indices allow land application of poultry waste in excess of the agronomic critical level for phosphorus and contribute to the elevation of STPs in areas where they are used. *See* Daily Trans., 5089:4-10 (Johnson Testimony).

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<sup>5</sup> A phosphorus index is a waste application management tool designed to determine the relative risk of nonpoint source pollution from phosphorus. *See* Daily Trans., 5088:13-18 (Johnson Testimony); *see also* Daily Trans., 5190:20-5191:10 (Johnson Testimony) (testifying that a phosphorus index gauges relative risk, not absolute risk). Notably, a phosphorus index does not scientifically determine how much nonpoint source pollution from phosphorus will reach streams from individual sites of waste application. *See* Daily Trans., 5088:19-5089:3 (Johnson Testimony).

12. As previously found and concluded, Defendants are, on both direct and vicarious grounds, legally liable for environmental consequences of the poultry waste generated by their birds in the IRW. *See* COL, ¶¶ 54-146.

13. Thus, the Court concludes that as a matter of law each Defendant should be enjoined from allowing any application of poultry waste generated by birds it places in the IRW occurring at rates in excess of the agronomic critical level for phosphorus (*i.e.*, 65 lbs/acre STP). This requirement neither legislates a new rule nor voids any existing statute or regulation of either Arkansas or Oklahoma. Instead, it remedies the unreasonable interference with the State's waters being caused by Defendants' waste disposal practices in a way that reasonably balances agronomic need for phosphorus in the IRW with the need to protect the State's nutrient-limited waters from pollution.

14. To the extent such poultry waste generated by its birds cannot be land-applied by its growers in the IRW without exceeding this agronomic critical level for phosphorus (*i.e.*, 65 lbs/acre STP), Defendants will be required to provide, at Defendants' expense, a market for such poultry waste such that the waste is transferred from the IRW for use by others in areas that are phosphorus deficient and otherwise used consistent with all applicable law. To the extent no such market can be provided, Defendants will be required to implement, at Defendants' expense, an environmentally appropriate means of disposing of such waste.

## **II. Conclusion**

WHEREFORE, premises considered, the foregoing proposed supplemental findings of fact and conclusions of law should be adopted.

Respectfully Submitted,

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I hereby certify that on this 1st day of March, 2010, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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